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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 239 / 7

UNITED STATES OF AMERICA,
Appellee,
vs.
CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California,
Appellants.

Appeal from the United States District Court for the Northern District of California, Southern Division.

AMICUS CURIAE BRIEF OF CONSOLIDATED MILK PRODUCERS OF SAN FRANCISCO, INC., IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT.

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This *Amicus Curiae* brief is filed on behalf of the Consolidated Milk Producers of San Francisco, Inc., (hereinafter called Consolidated) in support of the jurisdictional statement filed in this action by appel-

lants. Pursuant to Rule 42 of the Revised Rules of the Supreme Court, consent for the filing of this brief has been granted by the Solicitor General of the United States and the Attorney General of the State of California, representing the parties to this action.

No useful purpose will be served by our restating the analysis and argument so effectively made in appellants' jurisdictional statement. This brief will be limited to a brief statement of the interest of Consolidated in the pending litigation and the reasons why the Supreme Court of the United States is urged to accept jurisdiction.

THE INTEREST OF CONSOLIDATED IN THE LITIGATION

Consolidated is a non-profit corporation representing nearly 300 independent milk producers located in Northern California. Approximately 10% of the output of Consolidated's members is distributed to processing cooperatives; the balance is sold to commercial processors. This is roughly in proportion to the statewide pattern of distribution of fluid milk. Members of Consolidated are responsible for approximately 10% of the total production of fluid milk in the state.

Since its inception the primary purpose of Consolidated has been to provide its members with a means by which, through democratically elected representatives, they can deal with problems of producing and marketing their products. The provisions of the California Milk Stabilization Act and orders

adopted pursuant to it are vitally important to independent milk producers in California and, therefore, are of serious concern to Consolidated.

Two basic economic facts which characterize milk production in California make clear the importance of the state's milk stabilization program to these producers: (1) a continued oversupply of fluid milk; and (2) the small size and unequal bargaining position of the independent producers in selling to processors. Such chaos existed in the 1930's that the very existence of the producers was imperiled. Recognizing this to be a matter of public concern and welfare, the California Milk Stabilization Act was adopted in 1935, pursuant to which the State Director of Agriculture established minimum prices for sale of milk by producers. In 1937 the Act was amended pursuant to which authority was extended to an exercise by the Director establishing minimum prices for sale of milk by distributors.

Through area marketing orders, prices have been established for three classes of milk. The prices for Class I milk, which is the type sold to consumers and includes milk sold to military installations involved in the present controversy, have been just sufficient to enable producers to meet their cost of production. However, generally speaking, the program has accomplished the purposes for which it was intended.

The effect of the District Court order from which appellants' appeal is taken has been to disrupt substantially the milk stabilization program, to the serious detriment of the independent producers. Since

issuance of this order (and prior to the issuance of the temporary partial stay by Justice Douglas), processors engaged in cut-throat competition in bidding for contracts for supplying milk to military installations. Because of the unequal bargaining position of the independent producers, they were required to absorb the burden of the price-cutting by agreeing to accept as the price for such milk what the processor realized on the bid price after deducting for the cost and profit of processing. The return to producers fell from the minimum price of $5.19 per hundred weight to as low as $2.75 per hundred weight. This resulted in their producing such milk at as much as $2.00 per hundred weight below their cost of production.

Six percent of the total state's production is distributed to these installations. This represents a significant portion of total production of Class I milk. There is no market-wide pooling of milk, and, consequently, the burden of producing substantially below cost for the military falls unequally with some producers distributing as much as 50% of their production to this outlet. This is a burden which the independent milk producer cannot endure for long.

Consequently, Consolidated has a profound interest in the pending litigation, an interest which is by no means limited to minimum producer prices but to the entire milk stabilization program, since independent producers in California long ago recognized that real stability can be obtained only by establishing minimum prices at the distributor levels as well.

ISSUES RAISED SHOULD BE RESOLVED BY THE SUPREME COURT

Appellants have stated that the questions presented by the appeal from the order of the District Court are as follows:

1. Whether enforcement of the provisions of the California Milk Stabilization Act authorizing the establishment by the State Director of Agriculture of minimum prices at which dairy farmers may sell and distributors may purchase milk conflicts with the Armed Services Procurement Act of 1947.

2. Whether enforcement of the provisions of the California Milk Stabilization Act authorizing the establishment by the State Director of Agriculture of minimum prices at which distributors may sell milk conflicts with the Armed Services Procurement Act of 1947.

3. Whether enforcement of the provisions of the California Milk Stabilization Act against distributors or dairy farmers whose milk is sold to the United States at three particular military installations is constitutional.

4. Whether the District Court erred in permanently enjoining enforcement of the California Milk Stabilization Act as unconstitutional without trial and on motions for preliminary injunction (Action No. 39030) and for summary judgment (Action No. 39073) where the pleadings and affidavits raised issues of material facts.

5. Whether the District Court erred in failing to abstain from final decision pending construction by

the California Supreme Court of the California Milk Stabilization Act and California statutes relating to the acquisition of land and jurisdiction by the United States, and in enjoining appellants from proceedings in pending state court actions.

We concur with this analysis and with the argument so effectively made by appellants in support of their contention that the questions raised are substantial.

We are particularly disturbed by the decision of the District Court in finding a conflict violative of the Supremacy Clause—U. S. Constitution, Art. VI, Cl. 2—between the California Milk Stabilization statute and the Congressional policy embodied in the Armed Services Procurement Act of 1947, 62 Stat. 21.

ARGUMENT

Throughout its history, this Court has exercised restraint in finding that the action of a state, resulting from legislation enacted by its duly elected representatives after consideration of the subject matter, is unconstitutional.

We are particularly disturbed by the District Court's decision that the California Milk Stabilization statute is void under the Supremacy Clause of the United States Constitution as being in conflict with Congressional policy embodied in the Armed Services Procurement Act of 1947, 62 Stat. 21.

The aim of the California statute is to insure the state's residents a safe and healthful supply of milk

by the elimination of destructive competition through industry-wide minimum price fixing; *In re Willing*, 12 Cal. 2d 591, 594 (1939). Such statute constitutes a valid exercise by the State of its police powers. *Nebbia v. New York*, 291 U.S. 502 (1934). And when a state exercises its police power to legislate for its citizens' welfare, it has long been settled that "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States even when it may do so, unless its purpose to effect that result is *clearly manifested*. This Court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the *repugnance* or *conflict* should be *direct* and *positive*, so that the two acts could not be reconciled or consistently stand together'. *Sinnot v. Davenport*, 22 How. 227, 243 . . ." [Emphasis added]; *Reid v. Colorado*, 187 U.S. 137, 148 (1902). That this policy of restraint must be adhered to if the states are not to be deprived of practically all power to enact laws for the health and welfare of their citizens is apparent from the infinite areas in which Congress now legislates; such a policy encourages state and local governments to perform their functions in the absence of a conflicting policy clearly and properly expressed by Congress. The District Court's decision is in direct conflict with this Court enunciated policy of restraint.

In *Penn Dairies v. Milk Control Commission*, 318 U.S. 261 (1943), this Court held a similar minimum

milk price act to be wholly consistent with federal statutes[1] requiring competitive bidding by contractors seeking to sell supplies to the Army. The present requirement for competitive bidding contained in the Armed Services Procurement Act of 1947[2] is no more

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[1]"They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it 'impracticable to secure competition' . . ." (pages 272, 273).

[2]Armed Services Procurement Act of 1947, 62 Stat. 21:

Section 2(c):

"(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for perishable subsistence supplies;

(10) for supplies or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: PROVIDED, That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Con-

contrary to the minimum price regulations of Cali-

gress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (11) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: PROVIDED, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in main-

taining active engineering, research and development, are otherwise subserved: PROVIDED, That beginning six months after the effective date of this Act, and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (16) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder; or

(17) otherwise authorized by law.

(d) If in the opinion of the agency head bids received after advertising evidence any violation of the antitrust laws he shall refer such bids to the Attorney General for appropriate action.

(e) This section shall not be construed to (A) authorize the erection, repair or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 3, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraph (1), (2), (3), (10), (11), 12), or (15) or subsection (c) of this section.

SEC. 3. Whenever advertising is required—

(a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: PROVIDED, That all bids may be rejected when the agency head determines that it is in the public interest to do so.

SEC. 4.

(a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2(c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant

fornia[2] than the competitive bid requirements considered in the *Penn Dairies* case [supra], were to the Pennsylvania price regulations.

The declared Congressional purpose of the Armed Services Procurement Act of 1947 was to eliminate abuses in government contracting and assure the government of "fair and reasonable prices."[3] To hold

to section 2 (e) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee."

[2]See Appellants' Jurisdictional Statement Brief, pp. 67-104.

[3]"This bill, as amended, provides for a *return* to normal purchasing procedures through the advertising bid method on the part of the armed services . . . it capitalizes on the lessons learned during wartime purchasing . . . A quote from the House report presents this concept of the bill and applies equally to the bill as amended . . .

> 'The bill represents a comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments. It holds to the time-tested method of competitive bidding. At the same time, it pulls within the framework of one law almost a century's accumulation of statutes and incorporates new safeguards designed to eliminate *abuses*, assures the Government of *fair* and *reasonable prices* for supplies and services procured, and affords an equal opportunity to all suppliers to compete for and share in the Government's business . . .". [Emphasis added]
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> 2 U.S. Code Congressional Service 1048, 80th Congress, Second Session, Senate Report No. 571.

that the California statute conflicts with Congressional policy is to hold that the State of California has imposed "unfair and unreasonable prices" upon its citizens for their daily milk. Indeed, in its analysis of section 2(c)(10)[4] of the aforesaid Procurement Act, the Senate Report reveals a definite intent *not* to void state price regulations—"The experiences of the war and contracts negotiated since the war in the fields of stevedoring, ship repairs, chartering of vessels, *where prices are set by law or regulation*, or where there is a single source of supply, have shown clearly that the competitive bid advertising method is not only frequently impracticable but does not always operate to the best interests of the Government. It is therefore intended that this section should be construed liberally and that the review of these contracts should be confined to the validity and legality of the action taken and should not extend to reversal of bona fide determinations of impracticability where any reasonable ground for such determination exists . . ." 2 U.S. Code Congressional Service 1048, 1055, 80th Congress, Second Session. Thus, no clear manifestations of direct and positive conflict would seem to exist between the California statute and the Armed Services Procurement Act of 1947.

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[4] "(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if— . . .

(10) for supplies or services for which it is impracticable to secure competition; . . ."

62 Stat. 21.

The *Penn Dairies* case [supra] also casts grave doubts upon the validity of the District Court's reliance on 32 Code of Federal Regulations, Sections 1.301, 1.56.1, 1.56.2, 3.210-3, 608.1 and 608.3, for its conclusion that a comprehensive procedure exists which conflicts with the California statute. These regulations were promulgated by the Secretary of Defense pursuant to authority conferred by 70A Stat. 120, sec. 2202.[5] Such statute reveals no delegation to the Secretary by congress to avoid state minimum price laws; without such delegation the Secretary's actions cannot suffice to create a conflict. *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 276[6] (1943).

The District Court also erred in considering *Public Utilities Commission v. United States*, 355 U.S. 534 (1958), as determinative of the instant case. That case merely held that where the State allowed negotiated rates below the regular price schedule, the United States could not be required to submit its

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[5] "Notwithstanding any other provision of law, an officer or agency of the Department of Defense may obligate funds for procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense. The purpose of this section is to achieve the efficient, economical, and practical operation of an integrated supply system to meet the need of the military departments without duplicate or overlapping operations or functions."

[6] "The statutes authorizing the Secretary . . . 'to prescribe rules and regulations to be observed in . . . submission . . . of bids . . . give no hint of any delegation to the Secretary or his subordinates of power to do what Congress has failed to do—restrict the application of local regulations, otherwise applicable to government contractors, which increase price . . .'"

negotiated contracts to the State agency for a determination of the contract's validity; the Court rationale turned on the delay and related problems of subjecting Federal shipments to State regulation. In the instant case, and contrary to the *Public Utilities* case [supra], the United States is nowhere mentioned in the California Milk Stabilization statute; but rather, the District Court relies on the usual catch-all clauses to find the United States being subjected to State penal regulation. This action by the District Court presumes the California Legislature used a butterfly net to go bear hunting; such hardly complies with the requirement that in the application of the principle of supremacy the conflict should be so direct and positive that the State and Federal acts cannot be reconciled. *Reid v. Colorado* [supra]. The District Court's decision fails to appl[y] the principle that in determining whether a statute conflicts, its entire scheme should be considered. *Savage v. Jones*, 225 U.S. 501, 533 (1911).

In addition, even assuming that the District Court was correct in concluding that a prohibition had been placed upon the Federal Government, only that portion of the statute would be unconstitutional. The California Legislature provided for a divisible statute even down to phrases:

> "(b) if any article, section, subsection, sentence, clause or phrase of any provision of Chapter 17 of Division 6 of this Code is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said chapter. The Legislature hereby declares that it would have enacted each article, section,

subsection, sentence, clause or phrase of said chapter irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional."

California Agricultural Code, Section 4420; California Stats., 1955, C. 230, P. 697, Sec. 1.

Most difficult to understand is the basis upon which the District Court has interpreted Federal procurement policy to prevent a state from enforcing its minimum price laws to producers-distributor contracts. Such appears to be an unjustified extension of Federal supremacy. In *Alabama v. King & Boozer,* 314 U.S. 1, 8-9 (1941), it was held that "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity . . ." The same principle applies to producers. Even assuming the District Court correctly decided the Distributor-Government contract was freed from the California Act, no principle exists for immunizing the Producer-Distributor contract. If the Producer minimum price is a burden to the Federal Government, "it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct . . ." *Trinity Farm Co. v. Grosjean,* 291 U.S. 466, 472 (1933).

The District Court cites no supporting authority for its conclusion that the California statute is also void as applied to Producers. Even assuming as the Court appears to do, that the *Penn Dairies* case [supra] was overruled by the *Public Utilities* case [supra], an assumption we believe is wholly inaccurate, the Court at most could possibly proscribe the enforcement of minimum distributor prices; surely it cannot be argued that minimum *producer* prices place a "prohibition on the Federal Government" within the meaning of the *Public Utilities* case.

In placing special emphasis upon the foregoing arguments, we do not intend to minimize the importance or validity of other questions raised by appellants and arguments in support thereof.

CONCLUSION.

It is submitted, therefore, that Consolidated on behalf of its members and other milk producers has a profound interest in this appeal, that the Supreme Court of the United States has jurisdiction of the appeals, and that substantial questions are presented which warrant the Court to grant the appeals.

Dated, San Francisco, California,
September 21, 1961.

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